IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 15307 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KIRITKUMAR SAMPATRAI DESAI - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

Mr.P.M.Thakkar, learned Senior Counsel for Mr AM PAREKH for Applicant(s):1,MR RAJESH B DESAI for Applicant(s): 1, PMR.V.M.Pancholi, Learned ADDL.PUBLIC PROSECUTOR for Respondent(s) 1,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 17/03/2006

ORAL JUDGMENT

1. Rule. Mr.V.M.Pancholi, learned Addl.Public Prosecutor, waives service of rule on behalf of opponent State.

2. This is an application under Section 438 of the Code of Criminal Procedure seeking anticipatory bail. The applicant apprehends arrest for alleged non-bailable offences which are made punishable under Section 409 read with Section 34 of the Indian Penal Code and also under Section 109 of the Indian Penal Code.

3. It is alleged against the applicant that he alongwith other original accused has committed breach of trust by causing wrongful loss to the extent of Rs.28,45,65,000/- to the bank by entering into the transactions with Home Trade Ltd. Which were illegal transactions. Offence against the present applicant and other accused has been registered as C.R.No.I-214/2004 with Valsad City Police Station, Valsad. F.I.R. is lodged on 15th October, 2004. Applicant is shown as accused no.5 in the said F.I.R. At the relevant time,

he was the Director of Sheth B.B.Shroff Bulsar People's Co-operative Bank Ltd. situated in Mota Bazar locality at Valsad. It is alleged in the F.I.R. that accused no.2 was the Managing Director whereas accused nos.3 to 15 were the Directors of the said bank and accused no.16 was the Manager of the Bank. The F.I.R. further shows that by not complying with the guidelines prescribed by the Reserve Bank of India, the bank had entered into transactions with Home Trade Ltd. and then by the bank had suffered wrongful loss to the aforesaid extent.

4. The records of this application show that the applicant earlier had approached this Court by filing application under Section 438 of the Code of Criminal Procedure praying for grant of anticipatory bail. However, the learned advocate for the applicant sought permission to withdraw the same and the permission was granted accordingly by the Court vide order dated 12th May, 2005.

5. The present application therefore can be termed as successive bail application under Section 438 of the Code of Criminal Procedure. It is filed on the ground that after withdrawal of the first application, certain developments have taken place which may be helpful the applicant to have order of anticipatory bail in his

favour. It is contended by the applicant that the main culprit of Home Trade Ltd. with whom the present bank has entered into the transactions is released on regular bail by this Court vide order dated 26th October, 2005 passed in Criminal Misc. Application No.5438 of 2005. The second ground is that one of the similarly situated accused had approached the Apex Court against the order of rejection of his application by this Court filed under Section 438 of the Code of Criminal Procedure by order dated 28th December, 2005, by filing Special Leave Petition being 311 of 2006 and the Apex Court has issued notice and hence, directed that in the event of applicant's arrest he shall be released on bail by the arresting officer on furnishing bail bonds in the sum of Rs.10,000/-.

6. I have carefully perused the records of this case. I have also heard Mr.P.M.Thakkar, learned Senior advocate appearing for Mr.A.M.Parekh, learned advocate for the applicant and Mr.V.M.Pancholi, learned Addl. Public Prosecutor for the opponent State.

7. It is submitted by Mr.Thakkar that considering the fact that the main accused of Home Trade Ltd. has been granted regular bail it is desirable that present

applicant be granted anticipatory bail since Home Trade Ltd. is the company which is primarily responsible for the debacle of the applicant's bank. He has further submitted that one of the Directors of the bank viz. Gaurav Pandya, whose application was rejected by this Court has approached the Apex Court and he has been granted interim protection.

8. According to Mr.Thakkar the role of the present applicant is less serious than one of Gaurav Pandya. According to Mr.Thakkar, the applicant has been right from the beginning protesting against the investment being made through Home Trade Ltd.; whereas Gaurav Pandya had never objected to such investment being made through Home Trade Ltd. Mr.Thakkar has further submitted that Gaurav Pandya has attended more meetings than the present applicant wherein decisions to make investment through Home Trade Ltd. is taken. He has further submitted that so far Gaurav Pandya is concerned, order of this Court shows that there was extensive active participation by him in decisions making process for investment to be made through Home Trade Ltd. whereas such participation is wanting so far as the present applicant is concerned. It is, therefore, submitted by Mr. Thakkar that considering the aforesaid circumstances the applicant be at least

protected till the final outcome of the Special Leave Petition filed by Gaurav Pandya, pending before the Apex Court.

9. As against that, Mr.Pancholi, learned APP has vehemently opposed this application. He has furnished a compilation before the Court containing various pages on which he has placed reliance. According to him, the present application itself is not maintainable because it is successive application without there being any change of circumstances. He has further submitted that the change of circumstance has to be a substantive and not merely a cosmetic change. He has further submitted that so far the main culprit of Home Trade Ltd. is concerned, he is accused of different C.R. Number and totally different case. His decision therefore, cannot be pressed into service by the applicant to seek parity. He has further submitted that so far the order of the Apex Court is concerned, it is merely passed at the interim stage. It is an order without any reasons having been assigned by the Apex Court. It, therefore, cannot be considered as an order on which the parity can be decided.

10. Mr.Pancholi has also cited several decisions before

me with a view to show that successive bail application cannot be entertained and once the application is even withdrawn it is presumed that all the contentions available to the applicant have already been raised by him at the time of earlier hearing and he cannot be permitted to raise them again. Mr.Pancholi has also submitted that the applicant has been absconding since the time his earlier application has been rejected in the month of May, 2005 and when the person is absconding relief in the nature of anticipatory cannot be granted to him. He has further submitted that even on merits, the role of the present applicant is graver than the role of Gaurav Pandya. In his submission, the present applicant cannot be granted any relief since he is involved in a very serious case and the bank has suffered loss to the extent of over Rs.28 Crores.

11. Having carefully considered the aforesaid submissions, it is clear that the applicant is accused of the very serious offence which is made punishable with life imprisonment. The amount involved in the present case is over Rs.28 crores. This amount comprises deposits made by thousands of citizens. It is further clear that on apprehending his arrest, the applicant had approached this Court by filing

application under Section 438 of the Code of Criminal Procedure which was withdrawn by him on 12.05.2005. When the application is filed under Section 438 of the Code of Criminal Procedure before this Court it is presumed that it is fully argued and the withdrawal is sought only when the Court is not inclined to grant it. This is the normal practice adopted by the learned advocates appearing for the applicants with a view to avoid inviting reasoned order. I am therefore within my bounds to presume that the said application was argued fully on its merits wherein all the points which have been argued by Mr.Thakkar while comparing the cases between the applicant and Gaurav Pandya. It is also clear that the applicant, since May, 2005, does not seem to be available to the police for interrogation. This application is filed in the month of 21st December, 2005 meaning thereby that for seven months the applicant was not available to the police. It is stated by Mr.Pancholi that in the month of June, warrant under Section 70 of the Cr.P.C. has also been issued.

12. Be that as it may, the fact remains that the applicant has not made himself available to the police for interrogation. It is also clear that so far the order relied upon by Mr.Thakkar which is made on 26th

October, 2005 in respect of Sanjary Hariram Agrawal is concerned, it is made while deciding application under Section 439 of the Code of Criminal Procedure. It is by now, well established principles of law that the considerations that may be kept in mind by the Court while deciding the application under Section 438 of the Code of Criminal Procedure and under Section 439 of the Cr.P.C. are totally different. Mr. Thakkar therefore, cannot press this order into service for seeking parity.

13. Further, so far the order passed by the Apex Court in favour of Gaurav Pandya is concerned, Mr.Pancholi has rightly submitted that it is passed at the interim stage without hearing other side by the Apex Court and there is every possibility that the Apex Court may ultimately turn down his application since in the cases of other accused of this company, the Apex Court has not granted their applications.

14. In view of the aforesaid, I do not find any merit in the application of the applicant and hence it is rejected.

15. Rule is discharged. Direct Service permitted.

(AKSHAY H.MEHTA, J.)

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